United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

To be argued by
JULIA P. HEIT

76-1110

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P/S

United States Court of Appeals
For the Second Circuit

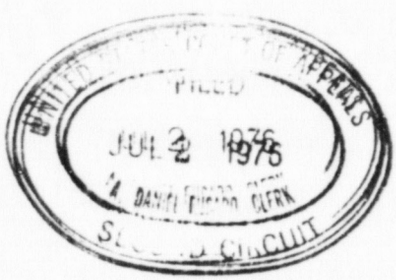
UNITED STATES OF AMERICA,
Appellee,

v.

ANTHONY STASSI,
Defendant-Appellant.

On Appeal From The United States District Court For The Southern District Of New York

APPELLANT'S BRIEF



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UNITED STATES COURT OF APPEALS
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STATEMENT PURSUANT TO RULE 28(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction rendered February 26, 1976 (Knapp, J.) in the United States District Court for the Southern District convicting Appellant Anthony Stassi after trial of conspiracy to violate on and after May 1, 1971, Title 21 U.S.C. Sec. 812, 841(a)(1), 841(b)(1)(A),951(a)(1) and 952 and prior to May 1, 1971 to violate Title 21 U.S.C. Sec 173 and 174. Appellant was also convicted of the substantive counts of unlawfully importing a narcotic drug into the country (Title 21 U.S.C. Sec. 173 and 174); concealing a narcotic drug in this country while knowing the same to have been illegally imported (Title 21 U.S.C. Sec. 173 and 174), the knowing importation of a narcotic drug (Title 21 U.S.C. Sec. 812, 841 (a)(1) and 841(b)(1)(A), and the knowing possession with intent to distribute said drug (Title 21 U.S.C. Sec. 812, 841(a)(1) and 841(b)(1)(A).

STATEMENT OF FACTS

I. Background and Pre-Trial Motions

On April 30, 1973, the Government filed Indictment Number 73 Cr. 405 which charged only appellant with conspiring to receive and conceal narcotic drugs from May 1, 1970 through October 15, 1970. Appellant was also charged with one substantive count of receiving 40 kilos of heroin. On this same date, Judge Ryan ordered the indictment sealed pursuant to the Government's claim that appellant was presently being investigated on a different charge, and that the unsealing of the indictment would jeopardize their investigation. On June 27, 1973, Judge Wyatt unsealed the indictment for the sole purpose of issuing a bench warrant for appellant's arrest, and then ordered the indictment resealed.

Appellant was arrested in Atlanta, Georgia on December 30, 1974 and was arraigned on the indictment on February 4, 1975. His counsel promptly informed the court that appellant intended to file motions to dismiss the indictment on the ground of lack of speedy prosecution. Counsel also protested the sealing of the indictment and claimed that the Government's reasons for sealing said indictment; to wit, that appellant was out of the country and under investigation on different

charges, were invalid.* Counsel asserted that the Government files, as disclosed to the defense, revealed that the Government knew the exact whereabouts of appellant and had ample opportunity to arrest him at either his New York or Florida address. Counsel therefore requested a de novo determination by the court of the Government's good faith in requesting that the indictment be sealed. Counsel contended further that if the Government's reasons were not valid, then the 22-month delay between indictment and arrest cannot be sanctioned, and the indictment should be dismissed.**

Additionally, counsel claimed that the two year delay between indictment and arrest impaired appellant's ability to adequately prepare a defense, since the memories of witnesses "have grown dim," certain potential witnesses have died, and factual documents have been lost.

In opposition to appellant's claims, the Government essentially responded that the defense could not point to any prejudice except the dimming of memories and the loss

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*It was brought to the court's attention that appellant at that time had not yet been arrested on a different charge (min. of 2/4/75, p. 9).

**These facts are set forth in appellant's motion dated 2/4/75 to dismiss the indictment for a lack of speedy prosecution and for a speedy trial.

of factual documents. The Government asserted that in a multi-kilo heroin transaction, unless the defendant was selling multi-kilos of heroin each day, "such allegations scarcely merit comment as they so revolt common sense."

The Government also submitted the following affidavits:

ARTHUR VIVIANI, former Assistant United States Attorney, set forth in his affidavit that the indictment was sealed because they did not want to jeopardize the continuing investigation of appellant; SPECIAL AGENTS BOCCHICHIO and ELLEDGE maintained in their respective affidavits that their investigation involved a large scale cocaine smuggling operation in Miami and that the Florida agents had requested that the indictment remain sealed so that their investigation would not be jeopardized.*

On March 4, 1974, oral argument was held on the aforementioned motions. In response to appellant's request for a hearing to determine the good faith of the Government in requesting the sealing of the indictment, the court stated that the defense had not made a sufficient showing of bad faith on the part of the Government to warrant a hearing.**

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*The Government's contentions were set forth in an affidavit dated February 27, 1975.

**In a supplementary memorandum of law dated April 21, 1975 requesting the dismissal of the indictment for lack of speedy prosecution, appellant again claimed that the sealing of the indictment was improper since the Government was aware of his whereabouts and could have taken him into custody. Appellant additionally claimed that there were certain periods when the indictment should be deemed (cont'd)

When appellant then requested an April trial, the Government stated that there was a possibility of a superseding indictment (min. of 3/4/75, pp. 11, 27-29, 34).

Thereafter, on April 8, 1975, the Government declared that there was a superseding indictment which named many more defendants. Counsel again protested and requested either a dismissal of the indictment, or alternatively, a severance of appellant's case from that of his co-defendants (min. of 4/8/75, pp. 20-21). Accordingly, on April 11, 1975, the court warned the Government to be prepared for a severance (min. of 4/11/75, p. 15).

(cont'd.) unsealed and that these particular periods should be counted against the Government when considering the delay in the context of the six months rule.

Specifically, appellant pointed out that on September 10, 1973, Judge Duffy ordered the indictment sealed until November 15, 1973. No application for a further extension was made until January 15, 1973, leaving a 60 day gap. On April 22, 1974, Judge Pierce ordered the indictment sealed until May 31, 1974. No further application for an extension was made until July 3, 1974. And in August of 1974, Judge Steward ordered the indictment sealed until September 4, 1974. The Government on September 5th failed to move for an extension and did not so act for a three month period.

Counsel therefore concluded that there was an aggregate period of 6-1/2 months when the indictment was unsealed and such periods should be held against the Government when compiling the period under this Court's six months rule for the prompt disposition of criminal cases.

On July 10, 1975, the court in a written opinion denied appellant's motion to dismiss the indictment for lack of speedy prosecution (said opinion is attached hereto in the Appendix).

Superseding indictment, 75 Cr. 395, was finally filed on April 11, 1975 and differed from the original indictment in that it added four defendants (Stassi, Sorenson, Otvos, and Guidicelli); enlarged the time frame of the conspiracy to encompass the period from January 1970 through December of 1972; added more co-conspirators; and charged appellant with the commission of three more substantive counts of narcotic violations.*

In a motion dated April 21, 1975, appellant moved for a severance based upon the information set forth above. Additionally, appellant asserted that the Government had first represented on February 4, 1975 that the superseding indictment would be sought in a short time, but it was now 70 days later. Counsel emphasized that because of the staleness of the indictment, the court had originally set a trial date for May 5, 1975. Counsel further maintained that while the other defendants would be unable to prepare for trial within the three weeks, appellant was then ready for trial. Moreover, according to counsel, since the other two co-defendants were already serving prison terms, their need for a separate trial was not as compelling.

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*On May 23, 1975, another superseding indictment (75 Cr. 502) was filed and differed from its predecessor in that it named two additional defendants, Carmine Consalvo and Charles Alaimo.

Appellant at this juncture also asserted that while the original indictment was pending and prior to the return of the superseding indictment, the Government had deported Otvos, a co-defendant, who had been incarcerated for a number of years in the Federal penitentiary. Predicated on this fact, appellant thereafter on July 25, 1975 moved to dismiss the indictment because of the deportation of Otvos. Appellant claimed that prior to his deportation, both Joe Stassi and Otvos were under investigation, and were questioned in Newark in November of 1974. It was submitted that Otvos' testimony would have been beneficial to the defendant since it would have contradicted the testimony of the Government's key witnesses, Perna and Verizino. Appellant additionally pointed out that on June 23, 1975, the court had denied his motion for a dismissal of the indictment on the ground of lack of speedy prosecution because he did not make a showing of actual prejudice. Appellant claimed that this burden was satisfied by the deportation of Otvos between the time of the original indictment and when the superseding indictment was returned.

Pursuant to appellant's application, a hearing was held on October 14, 1975 to determine if the Government's deportation of Otvos was wilful.

HEARING

J. WAYNE ALLEGOOD, Administrative Hearing Examiner for the Southeast Regional Office of the Board of Parole in Atlanta, testified that their records showed that a 14-year sentence had been imposed on Otvos on May 11, 1967 in the Eastern District of New York (H.46).* The full term date of his sentence was January 28, 1981. A prisoner, however, is not required to complete his full term as he gets good time subtracted from his sentence. Hence, taking into account his good time, the mandatory release date for Otvos was June 23, 1976. According to this witness, the Harrison Act in 1969 made prisoners ineligible for parole, but in 1974, the law was changed and prisoners were then eligible for parole in advance of their mandatory release date (H.46, 48). Under this new law, Otvos would have been eligible for parole on September 28, 1971 (H.48).

Accordingly, on January 21, 1975, a parole hearing was held for Otvos and at its conclusion, a hearing summary, which is a tentative decision, was prepared (H.52). This report recommended paroling Otvos on March 3, 1975 for deportation only. The Regional Director had the option of accepting this decision or referring the case to the entire Parole Board in Washington, where the question of Otvos' parole would be voted on by the entire membership of the Board of Parole.

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*Numerical references with the prefix "H" refer to the pages of the hearing minutes.

The Regional Director decided to go along with the alternate decision, which was to parole Otvos effective March 3, 1975 for deportation only (H. 53-56).

Although the Parole Board had previously requested an organized crime report on Otvos, which generally reflects any large-scale criminal activity of a sophisticated nature on the part of a potential parclee, they had not received this report as of the date that the decision to deport Otvos was made. The witness stated that the request for an organized crime report is common in cases where the offender has been convicted of large scale narcotic operations, and Otvos had been arrested in possession of 11 pounds of pure heroin that he imported from France (H.49-50).

The notice that Otvos was to be paroled to Immigration was sent to Otvos, the court, the United States Probation Officer, and the Washington Parole Board office. None specifically went to the Department of Justice, and there was nothing in their records to indicate that the DEA or the United States Attorney's office in the Southern District of New York or elsewhere received notice of the deportation (H.59). Allegood acknowledged that the Board of Parole established the general policy as to who received the notice and further admitted that the Department of Parole is a branch of the Department of Justice (H.61-63).

Allegood further testified that if there were an outstanding warrant on a prisoner recommended for parole, he would be paroled to the detainer (H.63). Hence, if Otvos had a warrant against him, he would have been paroled to that warrant. A DEA Agent could have ascertained this fact by simply making a phone call (H.64).

Moreover, Allegood explained that even after a parole grant, a recission hearing could be held to revoke that parole. Hence, when they received Otvos' organized crime report on the day after the notice to parole had been sent out (1/31/74), such a document could have formed the basis for a recission hearing and the revocation of his parole. The witness could give no specific reason why a recission hearing was not held on Otvos (55-56, 69-72).

SPECIAL AGENT JAMES BRADLEY, who was at that time attached to the DEA Task Force in New Jersey, testified that in November or December of 1974, Otvos was brought to Newark to be interviewed (H.91-92). Bradley informed Otvos that he was aware that he was participating in narcotics transactions while incarcerated in Atlanta. Otvos denied this. The Agent also stated that they intended to get an indictment against him in the near future and therefore asked for his co-operation, but he refused (H-93). The Agent additionally asked him if he knew Joe Stassi, and Otvos responded that he had met him in the yard at Atlanta. Bradley maintained that they did not ask him if he were involved in narcotic transactions with

appellant, Stassi, Verizino, Sorenson, or Consalvo because there was an ongoing investigation of Consalvo and Alaimo. According to Bradley, Otvos had informed him that he would be eligible for parole in May of 1975. He only learned from Assistant United States Attorney Nesland that Otvos had been deported one week after the indictment against him had been returned. He never contacted the United States Penitentiary or the Parole Board in Atlanta with respect to Otvos' parole date (H. 95, 99).

Agent Bradley admitted that in July of 1974, he might have had a discussion with Joe Stassi regarding his involvement in narcotics in the Federal penitentiary. He also told Stassi that he believed that appellant was involved in narcotics with him. Stassi, however, did not respond affirmatively (H.104-105). While Bradley mentioned appellant to Stassi, and not to Otvos, he was aware that both men were in the Atlanta Penitentiary together (H.106).

According to Bradley, in December of 1974, he had about ten conversations with the United States Attorney regarding the indictment of Otvos (H.112). Mrs. Williams, who was located in the Eastern District Court and who was preparing the organized crime report on Otvos, had informed him that he was eligible for parole in May of 1975. He never contacted the Parole Board to determine if this release date for Otvos was correct (H.112, 133).

SPECIAL AGENT CARROLL A. BOCCIA, OF DEA, testified that he participated in the interview of Otvos in November or December of 1974 before Agent Bradley had interviewed him. The possibility of obtaining his co-operation was explored at this time. They asked him if he knew Stassi and might have questioned him regarding Perna and Verizino, but they did not ask him about the other defendants (H.139). At Stassi's interview, conducted in this same period, they asked him about Otvos.

At this juncture, the court acknowledged that there was "plenty of negligence" in that Immigration had received a report that Otvos was the head of a criminal organization with members incarcerated at the Federal Penitentiary (H.168, 169). The Parole Board then gets a statement from the Department of Justice that they were about to indict Otvos and still they did not take any action (H. 170). The Court stated that it would be confronted with a difficult problem if it could be convinced that Otvos was a valuable witness (H.174).

JOS STASSI, testifying in behalf of the defense regarding his interviews in Newark, stated that the Agents discussed narcotics in the Penitentiary and also mentioned different French names to him, along with the names of appellant, Perna, and Verizino (H.177-179).

On another occasion, Otvos was brought to Newark with him. Otvos told him that the Agents had asked him about appellant.

Stassi maintained that if Otvos were available, he would have been important to his case because he was the only one that could deny what Verizino and Perna had stated. He therefore would have placed him on the witness stand (H. 182).

The court's opinion denying the defense motion is set forth in the Appendix.

II. The Atlanta Penitentiary Conspiracy

It was while incarcerated in the Atlanta Penitentiary that the Government's key witnesses, Mario Perna and Anthony Verizino, formed a partnership to sell narcotics to other inmates in the prison (293, 1316-17). To further their illicit enterprise, the two men endeavored to meet prisoners from France or South America who would provide them with new sources of narcotics for their future dealings (67). Thus, in 1967, Verizino introduced Perna to Jean Claude Otvos, a Frenchman, who was then imprisoned in Atlanta for smuggling narcotics. It was in January of 1970 that the two men asked Otvos if he could get narcotics into the country. Otvos responded that it would be no problem if they had someone who could handle the narcotics once they arrived. He told them to make the necessary arrangements and let them know if their people were willing to accept the shipments (86, 1318-1322).

After this latter conversation, Verizino told Stassi about Otvos, and Stassi in turn suggested that he could send his brother (appellant) to France to check it out (87-90). Otvos provided them with a note of introduction to the people in France, which Stassi supposedly gave to his brother in the visiting room (91-92, 1333).

While appellant was allegedly in France, Perna and Verizino decided that they would sell the goods to Ernie Malizia if appellant was successful (92-93) It was also decided that when Defendant Sorenson got out of the penitentiary, he would work with appellant so that appellant would not have to expose himself as being in the narcotic business (94). Perna and Verizino made further arrangements with Stassi that instead of accepting cash, they would each accept one kilo for every 50 kilos of heroin that came into the country, and would also have the opportunity to buy the heroin at either an equal or lower price than the customers (68, 1340).

During this stage, Verizino decided that the narcotics which they would receive as their share would be delivered by Sorenson to his girlfriend, Suzie O'Neil. Sorenson was also supposed to teach her to dilute the narcotics, and he would then distribute it (106).

Finally, in October of 1970, Perna and Verizino were informed by Stassi that one half the load of narcotics (70 or 80 kilos) had arrived, and the remaining half, according to Stassi, arrived a few days later, bringing the total number of kilos to 140 (140).

In late December of 1971, the second load arrived which consisted of about 120 to 130 kilos of heroin. Verizino and Perna received two kilos each as their share and received an additional kilo as a gift (122).

At this juncture, it appears that the relationships among the alleged conspirators were disintegrating. Perna first complained to Otvos that he was having difficulty with Verizino. Otvos likewise expressed his annoyance with the fact that Verizino was talking to so many people regarding the narcotics. Stassi, in turn expressed his annoyance with Suzie, who would get drunk and begin talking to many people about the business. Criticism also centered on Sorenson, who was spending a lot of money on the strength of future narcotic dealings (136). Stassi therefore concluded that they would have to kill Suzie, Verizino, and Sorenson, because they were placing everyone in jeopardy by their talking (138). It was decided that Perna, after his release, would send poison to Stassi, who would use it to kill Verizino.* Appellant would thereafter help kill Suzie and Sorenson (139-140).

In the meantime, Perna was released from prison on May 5, 1972, and thereafter met with appellant on a number of occasions. Ten days after his release, appellant asked him if he needed anything, and told him that there was nothing new regarding any shipment (168-169). At another meeting held a week later, appellant again stated that he had not heard of any shipment. At this time, appellant gave Perna a number of a drugstore where he could be reached in case of any emergency (171-172). At their third meeting at the Casa Del Monte, Perna met with both appellant and Sorenson, who told Perna that the third load had not yet arrived (1975).

*JOSEPH CONDELLO, testifying for the Government, stated that in September of 1972, he overheard one conversation in the prison yard among Grillo, Kapatos, and Stassi. Kapatos was upset because Perna never sent the strychnine that they were going to use to kill Verizino.

At still another meeting in July of 1972, appellant acknowledged that he had discussed killing Sorenson and Suzie with Stassi, but stated that he personally had no problems with Sorenson. Therefore, he informed Perna that whatever he wanted to do about it was allright with him. Appellant then told Perna that he had received a shipment in June and when Perna asked why he hadn't been contacted, appellant responded that the shipment had already been committed. Appellant said that he expected another load in September or October and that Perna could handle this entire load (194).

At their final meeting in 1972 at the Casa Del Monte, Perna was accompanied by Condello who did not meet appellant, but just sat at the bar. Appellant told Perna that they were having trouble regarding the shipment and that he had to go to France again, but would contact Perna on his return (190).

In November of 1972, Perna met with Condello and Danny Grillo, and together they formulated a plan to kill Sorenson (191-192). Perna picked up some guns, and the men drove to Delmonico's Bar in Brooklyn, where they had drinks with Sorenson, who told them "Gee, I'm sorry. I'm jammed up right now with loan sharks. I blew a lot of money." (807) He said that he did not have any goods, but when he got back on his feet, he would take care of them (808). The men then drove to Sorenson's girlfriend's house to wait for him, but he never appeared (192).

III. The Shipments

The only Government witness to testify to the actual shipments of narcotics was MICHAEL MASTANTUONO, who at 32 years of age worked as a barman at the Chez Clairette in Montreal (2107).

In May of 1970, Jacques Bec telephoned Mastantuono and asked him if he wanted to go to Paris. When he arrived in Paris, Bec asked Michael if he was willing to purchase a car, load it with heroin, and ship it to Montreal (2112, 2113). Michael said that he would think about it, but first, he wanted to go to the Cannes Film Festival to see his girlfriend, Danielle Ouimet, who was representing Canada in some films in which she starred (2113-2114). When he returned to Paris, Bec told him that he would make $500 per kilo plus expenses (2113). Bec then took him to a place to purchase a Citroen and gave him $1000 for a deposit (2116-2117). Michael ordered the car in Danielle's name. Although Bec was upset about this, Michael explained that he was only a barman, making $7000 to $8000 per year (2120).

Because Bec did not have the money to pay for the car, Michael returned to Montreal where he told Andre Ariolio about Bec's plans. The two men agreed to become partners and Andre provided the balance of the money that was owed for the Citroen (2121-2122). About a month and a half later, Michael

returned to Paris to pick up the car. He and Bec took the car to Biarritz where it was eventually packed with heroin. The car was then shipped to Montreal in Danielle's name (2129-2130). Approximately 20 days later, the car arrived in Montreal. Bec also arrived and told them that they would have to go to New York. Pursuant to Michael's instructions, Danielle drove the car across the Canadian border to Plattsburgh, where Michael met her. From that point, they both drove the Citroen to New York City (2133-35).

The next morning at about 5:00 a.m., Michael and Bec met, and together they went to pick up the car. They drove around for a while, and finally stopped behind a red Charger (2123). Bec introduced Michael to Andre Andreani, who told them to go and have some coffee (2138). Shortly thereafter, Andreani picked them up at the coffee shop and explained that he would signal them with the car's headlights and they should follow him. Andreani went to a corner where a man later identified as appellant was standing, and both mer got into a red Charger. When Michael started to follow the Charger, other Cadillacs kept passing his car and then dropping back (2140)).* They reached an exit and Defendant Alaimo indicated that they should go into a diner. Andreani arrived at the

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*Defendant Consalvo was also identified as one of the drivers of a Cadillac.

diner and directed them to follow the red Charger again. Appellant was still sitting in the front seat of the Charger and another man was sitting in the back (2143). They finally came to a garage where Bec, Michael, and Andreani dismantled the car with tools that appellant had previously given to Andreani (2146). The packages of heroin were removed from the car and given to Andreani who directed them not to make noise as there were people sleeping in the house. Appellant also gave Andreani some glue and a screwdriver (2147-2148). Michael then observed Andreani placing the packages of heroin into four different suitcases. He saw appellant and Andreani leave the house and place the suitcases in the trunk of the white Cadillac. Subsequently, Andreani brought them $40,000 which meant that 40 kilos of heroin had been delivered that morning (2150).

In June of 1971, Bec again called Michael and asked him to come immediately to France (2158). After his arrival, Bec informed him that there was a Fiat containing heroin in Montreal, but the owner did not have a visa to enter the United States (2158). Michael said that he would try to get the car into the United States (2160).

Michael returned to Montreal and because he could not find a car which was identical to the Fiat, he contacted Jean Cardin and arranged to use his stationwagon in exchange

for $10,000. Michael, Paul Graziano, Feliz Rossi, and Cardin dismantled the Fiat in Cardin's garage, removed the heroin, and secreted about 80 to 90 kilos in the station-wagon. Michael thereafter instructed Cardin to take the stationwagon to New York and to meet him at the Holiday Inn (2178-2179). Michael and Danielle also left for New York in their own car. He subsequently met Rossi, who led them to a house in New Jersey. Appellant was standing in front of the house and Defendants Sorenson and Alaimo were in the garage. At that point, the car was dismantled and the heroin was placed on the floor. After leaving the garage, Michael again saw appellant standing outside (2180-2183). The next day, Felix and Guidicelli had four suitcases which contained one million dollars (2184).

Michael was arrested in October of 1971 in Montreal and was extradited to New York in July of 1972 where he was charged with delivering a Ford Galaxy and a Barracuda, both containing heroin, to New York in February and August of 1971 ((2195). When he agreed to co-operate, the Government dismissed all but one charge against him, to which he pleaded guilty and in May of 1972, he was sentenced to five years imprisonment (2196-2197).

Michael admitted lying before the Grand Jury on three different occasions. In April of 1972, while testifying before the Grand Jury he had selected a photograph of John

Astuto and had claimed that he and not appellant was the recipient of the stationwagon shipment in June of 1971. Additionally, in his rogatory which was executed in August of 1972, he implicated Astuto as the Italian-American who received the stationwagon shipment and further claimed that Astuto was the same man who had been involved in the Galaxy transaction. Michael attempted to explain that he had placed the blame on Astuto because he knew that the man was dead, and that he was also attempting to protect Danielle (2368, 2372, 3829).

Michael's story regarding the alleged Citroen delivery was also replete with inconsistencies. He maintained that appellant was approximately 45 years of age when in fact at the time of the incident, he was 59 years old (2357, 3041). He insisted that the man in the red Charger wore glasses at some point but could not recall when. Moreover, Michael testified before the Grand Jury that the man alleged to be appellant, who was initially in the red Charger driven by Andreani, appeared in a Cadillac after Andreani's car had gone around the block. In his statement to Agent Bocchichio, when Michael first identified appellant's photograph, he claimed that he was the man who had entered the light colored Cadillac. Up to and including February of 1973, he never told the Agent that the man with the glasses was in the red Charger (2842).

Michael also exhibited confusion regarding the house where he delivered the Citroen. At one point, he claimed that the same garage in New Jersey had been used for both transactions. On another occasion, he told Agent Bocchichio that a house on Emerson Street in New Rochelle looked like the place where the Citroen was delivered (2368, 2345).

IV. Post Conspiracy Evidence

Although the conspiracy charged in the indictment only encompassed the period from May of 1970 up to and including December of 1972, the Government introduced a mass of evidence that went well beyond the 1972 date specified in the indictment.

Prior to the elicitation of this testimony, counsel objected to any evidence that was outside the scope of the indictment. When the court questioned the Government regarding the nature of their evidence, the Government responded that they would show that after Perna left prison in 1972 to 1973, he had a number of meetings with appellant at which time they discussed plans to import more narcotics from Europe into the United States (38). The court then queried why the indictment had been framed to so limit the conspiracy. The Government's only answer was "I was under the obligation to meet the deadline, and I had up to 1972, and since then I have developed this evidence from talking to all the witnesses and finding out everything that happened." Finally, the court stated

that it did not see how the defendants would be hurt - "so a witness testified in addition to a lot of conversations that took place during the conspiratorial years, had a few conversations after." Counsel protested ard claimed that the defendants' rights to a fair trial would be prejudiced if the Government is not kept within the confines of the indictment (48).

The following post conspiracy evidence was then introduced by the Government:

In February of 1973, Sorenson telephoned Perna and asked him to come to the Evergreen Bar in Brooklyn. Perna and Condello went to the Brooklyn bar and met Ernie Malizia, who was then a fugitive (195). The two men agreed to enter the narcotics business and they thereafter commenced dealing in large quantities of narcotics (196). At this juncture, the court asked "Do I take it this narcotic business he was now concerned in had nothing to do with this case?" The Government stated that the court was correct, but asserted that they were only using it for the purposes of conversation with respect to the conspiracy charged against these defendants (197).

Continuing with this line of evidence, Malizia told Perna that he had received a load in October and December of 1970. He then went on the "lam" and lost all his money when he left his business in the hands of Aibaduce who was arrested in 1972 (198). Again, counsel objected to this evidence, and when the Government argued that it was in furtherance of

the conspiracy, the court stated that it did not see its relevance (199), but still permitted the Government to continue elicting such testimony. According to Perna, Malizia additionally told him that appellant had borrowed $15,000 from him at the racetrack (199). When counsel moved to strike this testimony, the court commented again that it could not see its relevance, but theafter stated it was not particularly prejudicial in the context of this case (200, 109).

In March of 1973, Malizia asked Perna to telephone appellant and arrange for a meeting at the Casa Del Monte (200). The two men met appellant there, but when appellant saw Malizia, he asked him to leave as he was under surveillance (201). When Perna questioned appellant about the $15,000 that he owed Ernie, appellant said that he would speak to Ernie about it himself. Appellant at that point told Perna that he had refused a deal for narcotics in Mexico because he thought that he would have trouble getting rid of the goods here (201, 203). Counsel's motion to strike this testimony was also denied, but the court agreed that it appeared that the Mexican trip was irrelevant (208). Appellant then stated that he was leaving for France in a few days and would have a load for Perna on his return. Before concluding this conversation, appellant informed Perna that his brother had told him to forget about killing Suzie and Sorenson (203).

Approximately two weeks later in April of 1973, Sorenson told Perna that he had heard from appellant and that they were to meet him at the Briones Restaurant in Brooklyn (205-206). At this subsequent meeting, appellant informed Malizia and Perna that he had been to France and made arrangements to get the narcotics from Canada. He had worked a deal so that they would receive 10 to 20 packages every month or every other month. However, he first wanted to know if they were interested because they would have to buy the goods from Canada themselves, and the price of each package would range from $19,000 to $20,000. When Perna and Malizia expressed their willingness to go along with this deal, appellant said that he would make the final arrangements and then contact them (214-216).

Ten days later, Perna received another telephone call from Sorenson who said that they were going to have a meeting at a Brooklyn diner. They then met Sorenson and appellant, who said that the arrangements had been made, but that they would have to advance the full amount of money which Sorenson would take to Canada and turn over to the Frenchmen (218). Appellant was supposed to get in touch with Sorenson when a definite date was set (218). Perna then had an argument with Sorenson who had suggested to appellant that he could sell the goods elsewhere for a higher price (219).

Thereafter, on August 23, 1973, Verizino was released from prison and began living with Suzie. Malizia and Perna gave him $3000 and made him a partner in their own narcotic business which did not involve any of the defendants on trial (223-224).

In October of 1973, Perna again met with Sorenson who had previously telephoned him to inform him that Condello wanted to speak to him (224). They met in an apartment in Brooklyn where Condello told them that he had been arrested and had been released on bail. He therefore wanted to escape to either Florida or California, but needed some money. They gave him $500 (225). Malizia then asked Sorenson whether he had any goods, and Sorenson replied that he knew someone who had the goods, cut and diluted, but named a ridiculous price. Counsel made a motion to strike this testimony, but the Government withdrew the question and the court stated that there would be no prejudice if the question was withdrawn (226).

In December of 1973, Perna and Malizia went to Florida and attempted to contact appellant. However, on December 18, 1973, Malizia was arrested and at that point, Perna began to have problems with Verizino which again did not involve the defendants on trial. Perna therefore contacted Condello in the early part of January 1974 and asked him to murder Verizino (229). Condello at this time was with someone named Jimmy, who Perna later learned was an agent, and Condello then an informant (229). Perna gave Condello a shotgun and revolver.

Additionally, he negotiated with Condello and Bradley to sell them eight kilos of heroin and when he sold it to them, he was arrested on February 1, 1974.

The Government also elicited testimony from Joseph Condello which related to events subsequent to 1972. Condello admitted that he had many drug dealings with Perna. In February of 1973, he received 1000 pills from him. In March of 1973, he received 25 pounds of marijuana from Perna and Malizia when Sorenson was present. Additionally, Condello received one eighth of a kilo each week from Perna and would distrubute this heroin to his brothers, who in turn distributed it on the street. This business continued until he was arrested in September of 1973 (807). After he was released on bail, he went to the Evergreen Bar and Sorenson permitted him to stay at his apartment for two weeks (818). Sorenson also mentioned that appellant was supposed to be in France arranging for a shipment. Condello was then rearrested and became an informant for the Government (824).

In November of 1973, Condello and Bradley met with Perna for the first time at Romolo's Lounge in Fort Lee. Perna told Condello that Malizia did not want to give him any more goods because on one occasion he had a woman pick up the packages from him. Although Malizia refused to deal with Condello, Perna stated that he would sell him drugs. Perna also stated that he had heard nothing from appellant (839).

Condello and the Agent thereafter had many meetings with Perna and made purchases of narcotics (839). On one such occasion, Perna told them that he had given appellant $25,000 for a deal wherein they would have to go to Canada to pick up the goods themselves but the deal fell through (840). Perna also mentioned that he could not get in touch with appellant (842).

The Government had Special Agent James Bradley repeat Condello's testimony regarding the post conspiratorial conversations and acts. However, he embellished Condello's story and testified that at the meeting on November 27, 1973 at Romolo's tavern in Fort Lee, Perna had stated that the shipment had been called off by Stassi, since appellant and Sorenson had been wasting a lot of money and did not have the money to purchase the narcotics (1106). At the subsequent meeting at the Fort Lee diner on December 17, 1973, Bradley asked Perna if he was still with the old man. Perna replied that he and Malizia had attempted to get goods from appellant but the pickup would have to be in Canada and that they would have to front $25,000 per kilo. Perna further stated that appellant had borrowed money from loansharks and was in debt. Perna specifically mentioned that appellant had borrowed $22,000 from Sally Shield. Counsel immediately objected to this testimony and claimed that it had no probative value. The court agreed but stated "I think it should be struck but I think the

better course is to ignore it right now It will be forgotten in about 10 minutes. If I make a speech about striking it, they would remember it forever." (1111) Continuing with his testimony, Perna told the Agent that appellant was buying a ranch in Arizona. Another objection was entered to this testimony (1112).

In January of 1974, Bradley purchased 20 pounds of heroin from Perna and at this time Perna asked them to murder Verizino (118).

NICHOLAS MOLFETTA, an undercover officer with the New York City Police Department, testified that in February of 1974, he met Sorenson in the Evergreen Bar (2644-45). Sorenson told him that he owned the bar, but that it was under his brother-in-law's name. Sorenson also had an interest in an after hours club. In the summer of 1974, Sorenson met Carmine Consalvo at the after hours club. The two men shook hands, hugged each other, and then had a 20 minute conversation (2649-51). Counsel's motion to strike this testimony on the ground that it was not relevant was denied (2651).*

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*Counsel informed the court that when Detective Molfetta was called to testify, he was escorted into the courtroom and all the way to the front of the jury box by two rather husky-looking men. Counsel claimed that their clients' cases were prejudiced by this occurrence, since it exaggerated the significance of his testimony. The court commented "I thought it very strange to allow that to happen." (2663-2681). Counsel also informed the court subsequently that these two cops sat in the audience while the Detective testified and after his testimony, they went past the jury box and out the witness door to rendezvous with Detective Molfetta (2907).

The Government also permitted several witnesses to testify regarding their surveillances of appellant and Sorenson after December of 1972.

WILLIAM LeCATES, a former Special Agent with the DEA, testified that in June of 1973, he observed appellant at 2161 Northeast 122nd Street in Miami. This house was listed to a Carol Hoover. According to the Agent, appellant was observed arriving there about 6 or 7 times and leaving there 2 or 3 times. Specifically, on December 16, 1973, he observed appellant, Ms. Hoover, and a 14-year-old boy leave the car and go into a department store. He also observed them enter a Burger King (1770). Counsel objected to this testimony, claiming that it did not occur in the period charged in the indictment and further that such surveillance testimony gave rise to sinister connotations. When the court overruled this objection, appellant requested all the surveillance reports to show the absence of association (1757-60).

EVERETT ELLEDGE, a Special Agent with the DEA, testified that during November and December of 1973, he observed appellant in the vicinity of 3521 61st Street in Miami with a lady named Carol Hoover (1778). On December 5, 1973, he also saw appellant enter an apartment owned by Salvatore Autera. He

stated that he saw appellant with Autera on about 10 to 12 different occasions. The Agent was later told that Autera had owned a pharmacy in New York, and was appellant's neighbor (1782).*

SERGEANT BERNARD GILLESPIE testified that on January 15, 1973 at 4:00 p.m., he went to LaGuardia Airport pursuant to a telephone call. He observed appellant exiting from the arrival section where he was met by another man. Appellant made a phone call, went into the men's room, returned to the phone booth, and made another phone call. The two men entered a green Cadillac and drove to 252 West 72nd Street where appellant entered this building. The other man entered 251 West 72nd Street for about 10 minutes. Appellant left the building with an unknown female and went to the Casa Bella restaurant in Brooklyn (1838). He went into the bar and engaged in a conversation with Sorenson. The Sergeant then followed appellant to a building on Caton Avenue in Brooklyn. The Sergeant did not know whether appellant was simply paying his respects to someone in the building who had just sustained a loss (1841).

It should be noted that the Government also introduced surveillance evidence that occurred during the period charged in the indictment. Agent Elledge testified that on December 22, 1972, he observed appellant leave a condominium in Hollandale, Florida and drive with another individual to Sorenson's residence. Appellant went in for about 5 minutes and then returned to his own residence (1777). GROUP SUPERVISOR ALBERT GILLIS also testified that he observed appellant and Sorenson talking at the Sun City Motel in Florida. When the men looked in his direction, they stopped talking (1738).

A stipulation was entered that if HAROLD JOHNS was called as a witness, he would testify that on March 27, 1973, he was a Dade County Florida Police Officer and on that date in North Miami Beach, he observed Carmine Consalvo driving a Ford Thunderbird in which Defendant Alaimo was a passenger. Additionally, Alaimo was one of the many persons who attended the wedding of Consalvo in March of 1975 (304). Counsel objected to this testimony on the grounds of relevancy (3049).

SHOULKY ELLEHOW testified that he bought the pharmacy on West 72nd Street from Salvatore Autera (2838). He knew appellant as the uncle of Autera and also as a customer in the pharmacy (2646). Again, counsel objected to this testimony on the ground of relevancy (2641).

The Government also introduced the following documentary evidence referring to periods after December of 1972:

1. The telephone record of J. Mirabello pertaining to the years 1973 to 1975 (2659).

2. The 1974 telephone records of appellant, Carol Hoover, Salvatore Autera, and Issac Franklin (1798, 1800, 1802-03).

3. Appellant's passport application for the years 1969 and 1974 (Government Exhibit 103, p. 2661).*

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*The passport application established that appellent made 10 to 20 trips to Europe during 1973 and 1974.

The Defense

Appellant presented three witnesses whose testimony demonstrated that their premises were never used during the month of September 1970 as a transfer point in the Citroen transaction.

CARL BONIELO lived at 19 Holly Place, Larchmont, New York for eight years with his wife and three children, and was a fifth grade school teacher. He never saw appellant or anyone else in the courtroom before (3429). This witness knew Sal Autera, who was a neighbor and very friendly with his brother-in-law, Joseph Mirabella. He stated that Autera never asked him to use the garage, and further, he never recalled a group of cars using his garage at that time.

JOSEPH MIRABELLA lived at 23 Holly Place in Larchmont, New York, and worked for the New York Telephone Company where he was a sales supervisor for 22 years. When questioned regarding the group of cars using his garage, the witness replied that "it could not happen." (3456).

SALVATORE AUTERA, who presently lives in Miami, Florida with his family, testified that he had owned a pharmacy at 218 West 72nd Street in New York City. He never was arrested and lived at 35 Holly Place before moving to Florida on July 28, 1973.

Although very friendly with appellant, Autera denied ever engaging in any conspiracy with appellant to import heroin into the United States or a conspiracy to have the Citroen car go into Mirabella's garage (3505). He maintained that appellant never discussed drugs with him (3506-07).

ARGUMENT

POINT I

APPELLANT WAS DEPRIVED OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL WHEN THE GOVERNMENT WAS PERMITTED TO INTRODUCE A DELUGE OF HIGHLY PREJUDICIAL AND EXTRANEOUS EVIDENCE EMANATING AFTER THE TERMINATION DATE OF THE CONSPIRACY AS SET FORTH IN THE INDICTMENT.

Although it has been repeatedly held that evidence of a conspirator's post-conspiracy activity is admissible if probative of the existence of the conspiracy, or the participation of the alleged conspirator, the Government in this case stretched this rule to its breaking point. Krulewitch v United States, 336 U.S.440(1949); Lutwak v. United States, 344 U.S.604(1953); United States v. Anderson, 417 U.S. 211 (1974); United States v. Nathan, 476 F.2d 546 (2d Cir., 1973); United States v. Super, 492 F.2d 319 (2d Cir., 1974). Despite the continuous objections of the defense, the Government was permitted to bombard the jury with a mass of extraneous and inflammatory evidence that bore absolutely no relation to the conspiracy charged in the indictment. The court virtually gave the Government free rein to saturate the jury with vivid tales of murder, drug trafficking, gambling, loansharking, and a myriad of Government surveillances - all unrelated to the conspiracy charged and occurring subsequent to the termination date of the conspiracy as set forth in the indictment.

First, the Government proved the existence of a completely separate drug conspiracy involving only Perna,

Verizino, Condello and Malizia. Perna testified in detail regarding the formation of his partnership with Malizia and Verizino, and their dealings in large quantities of narcotics. Perna was then permitted to relate how Malizia lost all his money when he was forced to leave his business in the hands of Albaduce, who later was arrested.

Condello testified in even greater detail regarding his narcotic dealings with Perna and Malizia. He related that he had received 1000 pills from Perna, and thereafter received 25 pounds of marijuana from both Perna and Malizia. To further reinforce the image of these men as "heavy drug dealers," Condello informed the jury that he received one eighth kilo of heroin each week from Perna, and would distribute it to his brothers, who in turn would distribute it on the street. Both Condello and Agent Bradley told the same story regarding Malizia's refusal to deal with Condello because he had once sent a woman to pick up his narcotics. Perna, however, agreed to sell them the needed drugs, and Condello and the Agent thereafter made a number of narcotic purchases from Perna until he was arrested in January of 1974 for a 20 pound heroin sale.*

*Evidence was also adduced that Verizino was arrested in possession of 26 pounds of heroin, which he obtained from a source other than the defendants.

The evidence of this separate and distinct conspiracy, which admittedly did not involve any of the defendants on trial and which arose after the termination date of the conspiracy charged in the present indictment, was totally irrelevant to any issue in the case. It is indeed incredible that the court continually questioned its relevancy, but yet permitted the Government to elicit such extraneous and prejudicial evidence. The purpose of the Government in using such evidence is obvious. They sought to establish the criminal propensity of all the conspirators, including the defendants on trial, to engage in high-level narcotic activities. Since this evidence was not in furtherance of the objectives of the conspiracy charged, the admission of the testimony, replete with hearsay declarations and acts of the conspirators, constituted a clear-cut violation of the Krulewitch rule.

In addition to proving the existence of a separate conspiracy, the Government, by virtue of this post-conspiracy evidence, sought to impress upon the jury that appellant was an evil man, who was involved in a host of sordid criminal activities. Through Malizia's hearsay statement, appellant was depicted as a heavy gambler, who had dropped $15,000 at the racetrack (199). In a similar vein, the jury was told that appellant was in debt to loan sharks and owed one Sally Shields $22,000.00 (1111). Immediately following this testimony, it was elicited that appellant was also considering buying a ranch in Arizona. Once exposed to

this evidence, the jury could very well speculate that a man who was involved in these multi underworld activities and who could afford to buy a ranch, had to be involved in this lucrative French-Connection type case. This is especially true when the Government reinforced the image of appellant as a world wide narcotic dealer by bringing out the alleged Mexican deal (201).*

Again, the court agreed with counsels' objections that the bulk of the evidence was irrelevant to the issues in this case. Yet, the court still permitted the Government to continue eliciting this damaging testimony, and did not even attempt to mitigate its effect upon the jury.

Further highlighting the Government's post-conspiracy evidence, was Perna's plot to kill Verizino with the assistance

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*Not only was appellant depicted as a blatant criminal, but also Defendant Sorenson was portrayed as an independent drug dealer, involved in a variety of nefarious activities. First, Sorenson allegedly harbored and concealed a fugitive, Joe Condello. Second, he obviously had an independent source of narcotics when Malizia asked if he had any goods and Sorenson replied that he did but named a ridiculous price (224-225). Upon objection by counsel, the Government withdrew its question, but only after the jury heard Sorenson's incriminating response. And finally, Sorenson was shown to have an interest in an after hours club, an admittedly illegal-type establishment. Hence, given the witnesses' descriptions of the ignominious activities of both appellant and Sorenson, there could be no doubt left in the jury's minds that appellant had the criminal propensity to commit the crimes charged.

of Condello and Agent Bradley (229). This evidence bore no connection to the conspiracy charged in the indictment and constituted evidence of a third distinct conspiracy - its objective being murder. The Government will no doubt claim that such testimony was harmless in view of the prior plot to kill Verizino, Sorenson, and Suzie. It is precisely because there was evidence of a prior murder plan involving the defendants on trial that the Government should have been precluded from bolstering their case with such provocative evidence.

However, the most outrageous post-conspiracy evidence to confront appellant was the Government's proof that he had been under surveillance by various law enforcement officials even after his indictment in this case. This evidence was completely lacking in any probative value, and was intended solely to denigrate appellant before the jury.

The result of the officers' surveillance were clearly innocuous. It is difficult to conceive of any criminality attaching to appellant taking a woman and a 14-year-old boy to a department store around Christmas time and then to a Burger King for something to eat. Similarly, no inference of criminal behavior can arise from Sergeant Gillispie's detailed surveillance of appellant in June of 1973. The sum total of his observations consisted of the following activites by appellant: He was first observed leaving the arrival

section at LaGuardia Airport and being met by an unidentified man. He then made a phone call, went into the bathroom, returned to the phone booth, and made another call. Whereupon, the two men entered a green Cadillac and drove to 252 West 72nd Street. Appellant entered this building and ten minutes later, left with an unknown female. Together, the two drove to the Casa Bella restaurant in Brooklyn, where appellant had a conversation with Sorenson. From that point, appellant was followed to a building on Caton Avenue in Brooklyn (1835-1841). These observations, as depicted by Sergeant Gillispie, have the ring of a spy thriller. When the surveillance evidence is cast in this light, it undoubtedly appears that appellant was engaging in some shady maneuvers rather than carrying out his ordinary and innocent everyday activities.

The Government's argument at trial that such surveillance evidence was necessary to show appellant's association with Sorenson and Ms. Hoover is utterly devoid of merit. Appellant's association with both Sorenson and Hoover, well after the termination of the conspiracy, had no probative value in proving the existence of a prior conspiracy. In order for such an association to have any probative value, it was incumbent upon the Government to prove that appellant's associations at that point in time were in furtherance of the objectives of the conspiracy. Such a burden was impossible to meet, since at the time of the surveillances, the

alleged conspiracy was over. Appellant therefore could have been associating with these people for any number of innocent reasons.

But even if this Court should agree with the Government's contention that appellant's meetings with Sorenson and Hoover were critical to their case, the Government should have introduced those facts alone, and not the extraneous surveillance evidence that accompanied it. By instructing the jury to disregard the surveillance testimony in regard to the Hoover incident and consider only whether it demonstrated appellant's acquaintence with Ms. Hoover, the court was obviously of the opinion that this evidence was not relevant. Nevertheless, it permitted the evidence to reach the jury's ears. Even the minimal instructions by the court regarding the Hoover surveillance could not obviate the prejudice that inured to appellant when the jury heard that he had been subjected to repeated "tailing" by Government officials (1768). Certainly, this type of surveillance evidence is inherently prejudicial. It conveys a sinister impression as law enforcement agents are more likely to follow guilty people, than pursue the innocent. Under these circumstances, this Court should not sanction the use of this type of post-conspiracy evidence.

The final category of post-conspiracy that bore no relationship to the objectives of the conspiracy was the

Government's use of the following documentary evidence: The telephone records of Joseph Mirabella for the years 1973-1975 (2659); the 1974 telephone records of appellant, Carol Hoover, Sal Autera, and Issac Franklin (1798, 1800, 1802-03), and appellant's passport application, which showed a number of trips made by him to Europe in 1973 and 1974. Again, the Government failed to link these items to the conspiracy charged. Merely because appellant was acquainted with these people does not mean that his acquaintences were in furtherance of the objectives of the conspiracy. The same is true of appellant's passport application. Because he made a number of trips to Europe well after the termination point of the conspiracy does not mean that the purpose of his trips was to purchase drugs, or that he also made prior trips during the conspiracy. Such evidence was too far removed from the actual scope of the conspiracy to have any probative value.

An analysis of the cases pertaining to post conspiracy evidence fails to reveal any case where the introduction of such prejudicial evidence deviated so far from the objectives of the conspiracy charged and was so massive in nature. Krulewitch v. United States, supra (declarations of one conspirator consisting of only one conversation to conceal the conspiracy were held inadmissible after the conspiracy had ended); Lutwak v. United States, supra (in a conspiracy to enter into false marriages for the purposes of circumventing

the immigration restrictions, evidence of post-conspiracy conduct which showed the fraudulent intent of the parties was held admissible); Anderson v. United States, supra (post-conspiracy evidence directly relating to the rigging of an election, the object of the conspiracy, was deemed admissible); United States v. Bennet, 409 F.2d 888 (2d Cir., 1969) (the admissibility of the fruits of a post-conspiracy search which had uncovered the instrumentalities of a far reaching narcotic conspiracy has been sustained); United States v. Cohen, 489 F. 2d 945 (2d Cir., 1973) (post-conspiracy participation by the defendant in firearms training activities at Jewish Defense League Camp held admissible to show state of mind to enter the conspiracy to falsify firearm registration forms and defendant's propensity to commit this crime, since he had raised an entrapment defense); United States v. Mallah, 503 F.2d 971 (2d Cir., 1974) (post-conspiracy possession of eight thermometers was deemed evidence of intent to participate in prior narcotic conspiracy); United States v. Nathan, supra (post-conspiracy evidence that defendants had engaged in a number of drug transactions held to be probative of the existence of the conspiracy); United States v. Super, 492 F.2d 319 (2d Cir., 1974) (post-conspiracy evidence of a drug transaction, which occurred immediately after the prior enterprise was probative of the prior venture of the parties); United States v. Bermudez, F.2d (2d Cir., 1975) (evidence

obtained by a search conducted six weeks after the termination of the conspiracy held admissible to prove the existence of the conspiracy).* Hence, all the post-conspiracy evidence admitted in these cases was clearly probative of the existence of the conspiracy, was limited in its quantity, and arose within a close proximity from the termination point of the conspiracy, considerations which are conspicuously absent here.

In sustaining the admissibility of this voluminous amount of extraneous evidence, the court ignored the Supreme Court's repeated caveat that post-conspiracy evidence must be "scrupulously observed" in order to insure that the proffered evidence is in fact in furtherance of the conspiracy charged. Krulewitch v. United States, supra, at pp. 443-44; United States v. Anderson, supra, at pp. 416-77. Therefore, it must be concluded that the indiscriminate admission of the mass of irrelevant and highly prejudicial post-conspiracy evidence deprived appellant of his due process right to a fair trial, and now requires the reversal of his conviction.

*See also United States v. Pacelli, 491 F.2d 1108 (2d Cir., 1974)

POINT II

THE GOVERNMENT'S NEGLIGENT DEPORTATION OF OTVOS, AFTER HE WAS DESIGNATED A POTENTIAL DEFENDANT IN THE PRESENT CONSPIRACY, DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT UNDER THE SIXTH AMENDMENT TO EXAMINE A WITNESS CRITICAL TO THE PRESENTATION OF HIS DEFENSE.

Jean Cl .de Otvos was denominated a prime target in the Government's investigation into the alleged drug conspiracy in the Atlanta Penitentiary as early as December of 1974. The Government at this juncture had every intention of indicting Otvos for the very same conspiracy for which appellant already stood charged. Despite the Government's awareness that Otvos was scheduled to be paroled in the near future, and if paroled, in all likelihood, would be deported to France, the Government made no effort to secure Otvos' presence in this country. They failed to take the very minimal steps either of lodging a warrant against him with the Parole Board, or making one perfunctory telephone call to the Board to verify the exact date of Otvos' scheduled release from the Atlanta Penitentiary. Incredibly enough, the Parole Board, during this same period, received a written communication from the Justice Department stating that Otvos was about to be indicted by the United States Attorney's office. The Board chose to disregard this notice and without any concern for the pending criminal action, deported Otvos to France on March 3, 1975. Such

gross negligence and bureaucratic bungling on the parts of these Government agenices, in removing Otvos from the jurisdiction of the courts, violated appellant's Sixth Amendment right to examine a potentially important witness. Washington v. v. Texas, 388 U.S. 14 (1967).

The court below made a finding that "the Parole Board in its total conduct was grossly negligent in ignoring the specific communications from th Department of Justice saying that this individual was likely to be indicted." Although the court was of the view that no negligence could be imputed to the United States Attorney's office, the chain of events leading to Otvos' deportation demand that such a conclusion be rejected. The Government must be held accountable for its own nonfeasance in this matter, and their attempts to extricate themselves from any and all responsibility by claiming ignorance cannot be tolerated.

That the Government in December of 1974 had already formed the intention to indict Otvos, and charge him with participating in the present conspiracy is perfectly clear. At that time, Agent Bradley informed Otvos that he would probably be indicted in February of 1975 for his involvement in the reputed drug conspiracy in the Atlanta Penitentiary, and that the purpose of their interview was but an attempt to obtain his co-operation. Significantly, the Government at this particular time was well aware of Otvos' full role in this conspiracy, since Perna and Verizino,

the only witnesses to implicate Otvos, had already conveyed their tales in their entirety to Agent Bradley.* However, for some inexplicable reason, the Government delayed filing its indictment until after Otvos had been deported. While the Govenrment was overly anxious to file its indictment against appellant, they obviously were in no such hurry to indict Otvos, a defendant whom they knew or should have known, was in danger of being cast out of this country well beyond the reach of our courts. In such an important and far reaching conspiracy, it was incumbent upon the United States Attorney's office to make certain that Otvos, a prospective defendant who already was in federal custody, would remain in custody so that he would be available for trial. The United States Attorney's nonfeasance in this case had the same devastating effect on appellant's case as would have been the situation had their office actually participated in the deportation.

Furthermore, even assuming that the United States Attorney's office was not guilty of nonfeasance in the deportation of Otvos, it is submitted that the gross negligence of the Parole Board must be imputed to the Prosecution. The Government, in an effort to disassociate themselves from the negligence of the Parole Board, relied primarily on this Court's decision in United States v. Quinn, 445 F.2d 940 (2d Cir., 1971), a case which differs markedly from the facts of this case.

*In the face of these facts, the Government tried to convey the impression to the court that the prosecution as of March 13th was still investigating the case and had not finally determined who would be charged in the superseding indictment. (See Affidavit of Assistant United States Attorney Harry Batchelder.)

In Quinn, after a successful prosecution had ended in the Southern District, the indictment of a key Government witness, which heretofore had been sealed by the United States Attorney's office in Florida, was announced a week after the termination of the trial. The defendants therefore claimed that there had been a suppression of evidence on the part of the Government, and took the position that knowledge on any part of the Government is equivalent to knowledge on the part of this prosecution. Although this Court rejected the argument as absurd, appellant in this case is not raising such an abstract argument, and has established a sufficient nexus between the Prosecution and the Parole Board to justify an imputation of negligence to the Prosecution.

First, in Quinn, there was no finding of gross negligence on the part of any Government body. No claim was raised that either the Prosecutor's office in Florida or New York should have taken some affirmative steps to protect the defendants' interests. In this case, the court made a finding that the Parole Board was grossly negligent in its handling of Otvos' parole, and it is appellant's further claim that the Prosecution under the circumstances of this case, was obligated to take some action to secure Otvos' presence for trial, since they knew full well that his parole was pending. Second, no communication between the Prosecutor in the Southern District and their office in Florida existed in Quinn, which would have served to alert the other as

to what was transpiring in their respective offices in regard to the defendants' cases. Here there were specific communications to the Parole Board that went completely unheeded. Thus, as opposed to Quinn, the activities of the Parole Board and the Prosecution were so inextricably intertwined that the gross negligence of the former must be attributed to the latter.

Although this case is one of first impression in this Circuit, this Court fortunately has the guidance of the rulings in another Circuit. Applying the Compulsory Process Clause to Government action in making a witness unavailable to the defense, the Ninth Circuit has found such conduct, even if not deliberate, to violate the Sixth Amendment.

Thus, in United States v. Mendez-Rodriquez, 450 F.2d 1 (9th Cir., 1971), the defendant, who was convicted of conspiracy to smuggle aliens into the United States, alleged that the Government had violated his constitutional rights by deporting to Mexico three of the six witnesses before the defense had an opportunity to interview them. The Court in its decision noted that it had been the policy of the Immigration and Naturalization Service in that District to detain only three or four aliens as material witnesses, interview the remaining aliens, and then return them to Mexico. Based upon these facts, the Court held that while the Government is under no obligation to search out and produce witnesses who may be favorable to the accused, there is a denial of Due Process when such witnesses have been made unavailable by the conduct of the Government. It should be

noted that it is unclear from this decision whether the Prosecution had actual knowledge of the Immigration Service's policy to deport these aliens after their initial interview. Evidently, the Court felt it unnecessary to make such a distinction, since it correctly viewed the conduct of the Immigration Services and the United States Attorney's office as a single Government action which resulted in an abridgement of the defendant's Sixth Amendment right.

In United States v. Tsutagawa 500 F.2d 420 (9th Cir., 1974), which involved a prosecution for harboring and concealing of illegal aliens, the Government had returned to Mexico 35 of the 39 aliens involved before the defense had an opportunity to interview them. Although the possible defendants were unknown at the time of the deportation, the Ninth Circuit held that by placing these witnesses beyond the power of the court to require attendance, the Sixth Amendment had been violated.

On the other hand, the Ninth Circuit has affirmed convictions of those defendants raising similar issues where the defense failed to show any connection between the deported aliens and the crimes charged (United States v. McQuillan, 507 F.2d 30 (9th Cir., 1974); United States v. Castellanos-Machorro, 512 F.2d 1181 (9th Cir., 1975)), where the defense was shown to have had an ample opportunity to interview the aliens before deportation (United States v. Carillo-Frausto, 500 F.2d 234 (9th Cir., 1974); United States v. Loemli-Garnicia, 495 F.2d

313 (9th Cir., 1974)), or where the potential witnesses had left the country on his own accord and not as a result of any Government actions (United States v. Lomeli-Garnecia, supra).* In the present case, the Government is unable to prove the existence of any one of these factors that would justify an affirmance.

Finally, irrespective of which specific branch of Government bears the responsibility for the deportation of Otvos, one sound fact emerges. Appellant through Government action was deprived of a valuable right under the Sixth Amendment. Therefore, this Court should focus upon the loss of this fundamental right, rather than deciding the culpability of the agencies involved. The court below initially took this approach when it admitted that it would have been confronted with a difficult problem if it could be persuaded that Otvos' testimony was essential to the defense. In making its ruling dependent upon the value of Otvos' testimony, the court misconstrued the thrust of the Sixth Amendment right to Compulsory Process. The Ninth Circuit in Mendez-Rodriquez, supra, flatly rejected the notion that it was necessary for the defense to make some showing that the interview would have been fruitful to the defense. And the court subsequently explained its reasons for this policy in United States v. Tsutagawa, supra, at p. 434:

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*See also United States v. Mosca, 495 F.2d 1052, 1059 (2d Cir., 1972) wherein this Court in an analogous situation termed "deplorable" the Government's involvement in making a witness unavailable, but held such conduct harmless because the witness' post-trial depositions revealed that her testimony would have been of no value to the defense, and would only have enhanced the Government's case.

> The thrust of Mendez-Rodriquez is to prevent the basic unfairness of allowing the Government to determine which witness will not help either side and then to release those witnesses, for all practical purposes beyond the reach of the defendant . . . The vice lies in the unfettered ability of the Government to make the decision unilaterally. The Sixth Amendment guarantees a defendant the right to subpoena favorable witnesses . . . . Here the Government placed witnesses, who may have been favorable to the appelleees, outside the power of our courts to require attendance . . . A defendant has the right to formulate his defense uninhibited by Government conduct that, in effect, prevents him from interviewing witnesses who may be involved and from determining whether he will subpoena and call them in his defense.

In this context, the Government cannot argue that it is sheer speculation whether Otvos would have agreed to testify in behalf of the defense. It was the opportunity to interview Otvos which was of paramount importance to appellant for such an interview could have led not only to favorable testimony from him, but also to other information relevant to the defense. It is offensive to any concept of Due Process that the Government, but not the defense, had every opportunity to interview Otvos before his deportation and readily took advantage of these opportunities. Because their attempts to glean information from him were not successful does not mean that the defense should be deprived of a similar opportunity to question this critical witness.

But even if this Court should reject the Ninth Circuit's position and require that appellant establish that Otvos' testimony was essential to his case, appellant has more than satisfied this burden. Otvos was the only person who could have

refuted or offered information to refute Perna's and Verizino's testimony regarding the inception of the conspiracy, and their claim that he was in fact the "French Connection." While Defendant Joe Stassi denied involvement in any drug conspiracy in the Atlanta Penitentiary, he could not deny Otvos' participation since he was never alleged to have been present during Perna's and Verizino's discussions with him. Therefore, Otvos was the only witness who was in a position to refute their stories. His testimony would have been invaluable to the defense.

Accordingly, the conclusion must be reached that the Government's negligent deportation of Otvos substantially interferred with appellant's constitutional right under the Sixth Amendment to present a full defense in his own behalf and such conduct now requires the reversal of his conviction, together with the dismissal of the indictment.

POINT III

APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL UNDER THE FIFTH AND SIXTH AMENDMENTS BY VIRTUE OF THE 29-MONTH DELAY BETWEEN INDICTMENT AND TRIAL DURING WHICH TIME A PRIME DEFENSE WITNESS HAD BEEN NEGLIGENTLY DEPORTED TO FRANCE BY THE GOVERNMENT AND APPELLANT HAD BEEN SUBJECTED TO CONTINUAL GOVERNMENTAL SURVEILLANCES.

In this case, the Court is confronted with a combination of extraordinary circumstances which finally culminated in a denial of appellant's constitutional right to a speedy trial. Since appellant has satisfied the four-prong test enunciated in Barker v. Wingo, 407 U.S. 514 (1972), he is now entitled to the severe remedy of the dismissal of the instant indictment.

The court below properly concluded that at the first available opportunity appellant promptly asserted his right to a speedy trial and further, that the 29-month delay between the indictment and trial was of sufficient duration to trigger the presumption of prejudice. Thus, the questions to be resolved by this Court are whether good reason existed for the delay, and whether appellant, as a result of the delay, has sustained any prejudice.

From April 30, 1973 to December 20, 1974, a period of 20 months, the indictment was ordered sealed on the strength of the dual representations by the Government that appellant was out of the country, and that the unsealing of the indictment would jeopardize an unrelated federal investigation involving appellant.

The court below found as a fact that the sealing of the indictment was not necessary to take appellant into custody, since "the Government was indeed aware of the defendant's whereabouts during the period in question." (court's opinion dated 6/20/75, f.n. 9) It is appellant's position that the sealing of the indictment on the ground that the Government did not want to jeopardize another independent investigation was in direct contravention of Rule 6(e) of the Federal Rules of Criminal Procedure and that the delay which was incurred as a result of the improper sealing of the indictment cannot be deemed "good reason" within the purview of the Barker v. Wirgo rationale.

Rule 6(e) of the Federal Rules of Criminal Procedure provides:

> The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the Clerk shall seal the indictment except when necessary for the issuance and execution of a warrant or summons.

This Rule authorizes the sealing of the indictment for only one purpose and no other -- the taking of the defendant into custody. The obvious objective of such a rule is to insure that a defendant will not flee the jurisdiction of the court upon learning that an indictment has been filed against him. There is nothing contained in the language of Section 6(e) that would permit the Government to use this provision as a means of continuing their investigation into any unrelated case. Clearly,

if the Rule was intended to have such a broad scope, it would have so specified. The court's over-broad interpretation of the intent of the Rule is but a prime example of judicial legislation.

Moreover, the court erroneously was of the opinion that despite the absence of any delegation of authority, the Rule gave the court wide range discretionary power to seal the indictment so that the Government could carry out its legitimate law enforcement obligations. However, the only discretionary power given to the court under the Rule is the right to decide whether or not it is necessary to seal the indictment in the first instance until the defendant is in custody. That is as far as the court's discretion extends. While law enforcement might be a legitimate concern of both the courts and the Government, the Government cannot be permitted to use the device of the sealed indictment as a means to conduct other unrelated investigations.

Unfortunately, there is a dearth of case law relating to this issue, but the limited law that does exist firmly supports appellant's position. In United States v. Sherwood, 38 F.R.D.14 (D.C. Conn. 1964), the defendants moved for a dismissal of the indictment on the ground that their Sixth Amendment right to a speedy trial had been violated. The indictment in that case was initially ordered sealed from July 1962 to September 1962 on the basis of the Government's application that two of the defendants were absent from the jurisdiction. From September 1962 until the date of the unsealing of the indictment in August

of 1973, the Government knew the whereabouts of the two defendants, but was granted a continued sealing of the indictment in order that they might evaluate the claims of another defendant in respect to any alleged Governmental promise of immunity to him. In dismissing the indictment of those defendants who were unaware of the existence of the indictment until its unsealing, the court specifically stated in reference to the Rule:

> Rule 6(e) grants discretion to the court to seal an indictment, until the defendant is in custody or has given bail. This rule must receive an equal status with federal statutory law 18 U.S.C.A. Sec. 3771. This discretionary authority may be exercised notwithstanding the fact that the indictment was returned on the last day within the statute of limitations. The exercise of such discretionary action must be necessary, or reasonable duration under the circumstances, and exercised only to accomplish the limited purposes authorized by the criminal rule for which it was designed. (emphasis supplied, at P20)

Hence, the court below in granting the Government's continual applications to seal the indictment on the basis of these unrelated investigations exceeded the limited purposes authorized by Section 6(e).

In addition to exceeding the bounds of Rule 6(e), the Government, as a result of the misuse of this Section, caused appellant to sustain overwhelming prejudice. The Government used this period, when the indictment was sealed, to conduct its many surveillances of appellant and then proceeded to introduce the fruits of their surveillances at his forthcoming trial (see Point I). Thus, it appears that the Government was not

quite as candid with the courts regarding their true reasons for requesting the sealing of the indictment. While there might very well have been another investigation involving appellant, the Government still used this interval for a third purpose -- to gather more evidence against appellant by keeping him under constant surveillance. Consequently, during this entire period, appellant was subjected to the most devastating type of Government harassment. He was forced to undergo the humiliation and degradation of having his every movement observed by Government agents. His right of privacy was violated in the grossest sense. Clandestinely charged with a crime, he lived that entire 20 month period as a marked man, unable to confront his accusors or stop such an abominable practice.* Had the indictment been made public, it is highly unlikely that the courts would have tolerated such actions on the part of the Government. Surely, it was never contemplated by the framers of Rule 6(e) that this provision would be used for such means.

Appellant was also forced to sustain a more traditional type of prejudice because of the undue delay in the prosecution of his case. He lost an invaluable witness. During the period between indictment and trial, the Govenment had negligently deported Jean Claude Otvos, a key figure in the present conspiracy, to France. The value of securing Otvos' testimony or just soliciting

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*According to the Government's proof at trial, appellant was allegedly aware of the fact that he was continually being followed. At his meeting with Perna and Malizia, he supposedly warned Malizia that he was under surveillance.

information from him, has already been set forth in Point II. It is suffice to say that appellant at this point need not prove that the United States Attorney's office was involved in the deportation of Otvos. Regardless of whether or not the Government is responsible for the loss of Otvos, the sole factor to be considered in conjunction with the speedy trial claim is that such an important witness was in fact unavailable to the defense because of the undue delay in bringing this case to trial.

Hence, considering all the facts and circumstances in this unique case, the Barker v. Wingo tests have been satisfied and appellant must now be accorded that severe remedy of the dismissal of the indictment.

POINT IV

THE TRIAL COURT'S REPEATED DISPARAGEMENT OF THE DEFENSE AND ITS CONSTANT INTERJECTION OF ITS OWN OPINION INTO THE CASE DEPRIVED APPELLANT OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

This record abounds with instances of improper judicial conduct. Throughout the entire trial, the court repeatedly demeaned defense efforts to effectively cross examine the Government witnesses and implied by its remarks that counsel, in attempting to defend their respective clients, were wasting both the court's and the jury's time. Most prejudicial, however, were the court's many remarks and innuendos which conveyed the unmistakeable impression to the jury that the court was partial to the Government's case. The total effect of the court's conduct at trial resulted in a deprivation of appellant's due process right to a fair trial, and now requires the reversal of his conviction. United States v. Nazzaro, 472 F.2d 302 (2d Cir., 1973); United States v. Pelligrino, 470 F.2d 1205 470 F.2d 1205 (2d Cir., 1972); United States v. Cuevas, 510 F. 2d 848 (2d Cir., 1975).

Each counsel in this case was the butt of the court's facetious and sarcastic remarks. The court constantly ridiculed Mr. Naden (Sorenson's counsel) when he was attempting to examine key Government witnesses. When Perna was asked by Mr. Naden whether he realized that he could get 90 years from Judge

Cooper, and an additional 15 to 25 years from his state court cases, the court queried "on top of ninety years." Counsel answered quite correctly that the questions related to Perna's state of mind. Whereupon the court in front of the jury responded "state of mind doesn't seem very relevant as to what's going to happen after 90 years." (658)

While the court later agreed 100% with counsel "that the remarks should not have been made," the damage was already done (674). The court's subsequent instructions to the jury to disregard its comment served only to focus their attention on the growing antagonism between the court and the defense:

> The other thing I point out is that any colloquy between the court and counsel is completely meaningless as far as your job is concerned. . . . For example, I have been very nice to Mr. Newman (Defendant Alaimo's counsel) because he hasn't bothered me yet. Any colloquy, I mean if counsel has come to the bench, and I say no, it shouldn't have any prejudice against counsel. . . .
> I didn't intend any facetious remarks about what was going to happen ninety years from now or in any way denigrate him or make light of the serious problem that you have to decide (684-85).

At still another point during Mr. Naden's cross examination of Perna, the court admonished counsel in front of the jury "you know it's perfectly clear and if you don't you ought to know. Get on with the case and stop this backhanded stuff." (644) The court later felt compelled to characterize Sorenson's cross examination of Mastantuono by stating "you ask silly questions, you get silly answers." (2605). It was only towards the end

of the trial when he court was finally advised by its law clerk that it was not treating Mr. Naden properly, did the court in front of the jury extend its apologies to him (2400-01). Such apologies came far too late in the trial, since the court had already firmly indoctrinated the jury with the notion that it was negatively predisposed towards the defendants' cases.

Other counsel were likewise affected by the court's sarcastic remarks in regard to their efforts to defend their clients. Upon Mr. Garland's cross examination of Condello regarding the importance of what he told Agent Bradley, and whether Bradley wrote the statement down, the court promptly characterized counsel's question as "ridiculous" and then directed him to "stop asking ridiculous questions, because the witness assumes the questions are intelligent and he tries to make sense out of them." (936-37) It should be noted that counsel's questions were indeed perfectly proper in that he had every right to ask Condello whether the Agent had written his statements down. Nevertheless, because of the continuous and heated by-play between the court and Mr. Garland, appellant's counsel was forced to make the first of his many motions for a mistrial (945-46).

Nor did appellant's counsel remain immune from the court's attack. When Mr. Kadish sought to question Mastantuono whether a particular statement he made before the grand jury was true, the court exclaimed "I think we can stipulate that all these things were said and we can also stipulate that no human being

can remember the exact things he said." (2311) It was thus incumbent upon counsel to point out to the court that the accuracy of the witness' memory was for the jury, and not the court, to determine (2311). Subsequently, counsel was again thwarted in his attempts to cross examine this same witness regarding whether his statement in the rogatory that there were four Cadillacs, and not three, was a lie or the truth. The court interrupted and told the jury "he said it was a mistake." (2278) At least to its credit, the court noted for the record that it made such a statement "in a very intensive voice." (2332)

Because of the court's continuous interruptions of his cross examination of Mastantuono, Mr. Kadish was forced to request that the court not interject into his cross examination, since it was making him look bad in front of the jury (229-30). Such unwarranted intrusions during the cross examination of this particular witness were especially devastating to appellant's case. Mastantuono was the only witness to actually connect appellant to any narcotic activities. Absent his testimony, the Government's case could not stand. Therefore, it was crucial that appellant's counsel be permitted to effectively cross examine the witness without being subjected to the many caustic interruptions by the court.

Perhaps the most offensive of the court's remarks occurred during the Government's direct examination of Agent Bradley

regarding his interview with Perna in October of 1974. The following transpired:

> Q. To the best of your recollection, Mr. Bradley, tell the court and jury what you recall Mr. Perna first telling you, and put it in his words as close as you can.
>
> A. I first spoke to him regarding this matter during that time period. I stated to him that I knew he was familiar with Anthony Stassi and his narcotic dealings.
>
> Mr. Garland: Objection to what he stated.
>
> The Court: Well, you can't have a conversation unless he started it. Obviously all that is relevant is what Perna told him, but you can't have a conversation with only half of them.
>
> * * *
>
> A. I stated to Mr. Perna that I knew that he was aware of the narcotics activity of Anthony Stassi (1163).

When counsel objected to the self-serving conclusion by this witness, the court declared:

> The jury knows that the prosecution thinks your clients are guilty or they wouldn't have brought the case. The question is whether the prosecution's belief is correct. It is merely telling him the agent thinks he got a case. It isn't something they don't know (1164).

This outrageous remark squarely placed the integrity of the United States Attorney and the court directly behind the credibility of each and every Government witness. When counsel sought to protest such unwarranted remarks, the court

only retorted (out of the jury's presence) "certainly, the jury doesn't think we are spending two weeks here because nobody thinks the defendants are guilty." (1180) Finally, the court admitted, "I think it would have been better if I hadn't done it," but added, "I don't think it is prejudicial." (1186-87)

Nothing could be further from the truth. It has been repeatedly held that it is error for the Prosecution to express its own opinion regarding the guilt of the defendants. United States v. Grunberger, 431 F.2d 1067 (2d Cir., 1970); United States v. White, 324 F.2d 814 (2d Cir., 1963) It is far more egregious for the court to take such a position in behalf of the Government. Yet, that is precisely what the court did. The court in essence vouched for the credibility of every single Government witness by stating that they were all in the court-room because the Government thinks the defendants are guilty. This one remark alone had such a prejudicial impact that it should be sufficient in and of itself to warrant a reversal of appellant's conviction.*

It is recognized that the court in many of the incidents set forth above tried to allay the damage by issuing corrective instructions to the jury. It is unrealistic to expect the jury to take such instructions seriously after listening for so

*Other incidents of judicial misconduct wherein the court displayed its hostile attitude towards the defense are interspersed in this record (3015-16, 3234, 3236, 3287, 2071-72, 2286).

mary weeks to the court's unyielding persecution of the defense.

In sum, therefore, because the court allowed such an attitude of judicial disapproval to permeate the trial, appellant's conviction must now be reversed and a new trial ordered.

POINT V

THE PROSECUTOR'S MISCONDUCT DURING SUMMATION SO PREJUDICED THE JURY'S DELIBERATIONS THAT IT DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL.

The prosecutor in a federal trial is charged with the promotion of justice, rather than the interests of any particular party to a controversy. As the Supreme Court stated, in Berger v. United States, 295 U.S. 78 (1935), he is the representative of a sovereignty "whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." Id. at 78. In this case during his rebuttal summation, the Assistant United States Attorney repeatedly and emphatically expressed his personal belief in the truthfulness of the Government's witnesses and used the prestige of the Government he was representing and his position as Assistant United States Attorney to bolster the testimony of the Government witnesses. His many inflammatory remarks had the clear purpose of arousing the passions of the jury and the cumulative effect of denying appellant his right to a fair trial.

The Government's case was based on the testimony of co-conspirators, all of whom had agreed to cooperate with the Government in return for a recommendation of leniency at sentencing. The credibility of these witnesses was the crucial issue at trial. In referring to their testimony during summation, the Assistant United States Attorney continually injected his own credibility and the prestige of his office into the jury's deliberative process in his drive to obtain a conviction.

Because counsel in their respective summations had the "audacity" to question the credibility of the Government witnesses, the Assistant United States Attorney construed such remarks as a personal attack on both himself and certain Drug Enforcement Agents. He stated:

> Who is doing it? Do you believe that? Did they ever tell you that Tony Bocchichio was suborning perjury or Mr. Sear and myself when we were questioning these people long ago and you heard them testify that hour after hour after hour we spent preparing them. Of course, they prepare their witnesses, we prepare ours. Were we suborning perjury, suggesting to them how to come in here and put the whole thing together?
>
> That's what they are saying. Talk about gloss. Why don't they say it like it is? That's what they are saying. Zealous agents, zealous prosecutors, certain you are zealous when you enforce the law, but to suborn perjury, to bring these witnesses in here and to suggest to them time and again, no, you have got to say this, you have got to say that, you have got to have that meeting. Those witnesses were put on the stand and they testified to the events that they were telling the Government long ago when they had never talked to each other (3918).

The Assistant United States Attorney continued to harp on the reputed claim of the defense that the Government was guilty of subornation of perjury.

> They claim that the government is guilty of subornation of perjury. What else would one say when all the evidence is against you, as it is against Joseph Stassi and Anthony Stassi and Bobby Sorenson. You can't for the life of you show how those witnesses can tell the same story unless you say it is a frame.
>
> * * *
>
> The defendants have to say this, because it is either the truth or it is a frame. The problem they have is there is no way in this case to prove that these witnesses got together and framed them; so try the government; the government did it. Well, I submit to you that is ridiculous and it is obviously ridiculous (3924-25).

Since the Assistant United States Attorney had never testified or been cross examined at trial, his credibility or conduct should not have been an issue in the jury's deliberations. Yet, by the above statements, the Assistant United States Attorney in effect told the jury that in order to acquit the defendants they would have to find that the Assistant United States Attorney, and, by implication, the United States Government, had participated in a scheme to suborn perjury. See United States v. Spanglet, 258 F.2d 338 (2d Cir., 1958).

The Government continued in this vein when it discussed the various deals that the witnesses had made with the Government:

> Now, they want you to say don't rely on those witnesses. Don't rely on those witnesses. Why does defense counsel say that? Because they have got a deal. They got a gun at their heads. Is that gun pointed at their head, one

> that makes them lie or one that makes them tell the truth. The truth is the only way out for Mario Perna. The truth is the only way out for Anthony Perna. The truth is the only way out for Anthony Verizino, and it is the easiest way out. If you tell the truth and the Government tells them, tell the truth, the easiest way out for them is to tell the truth. Not to manufacture a bunch of garbage. If they lied, if they deliberately lie and frame people, the deals are off. But when they are sentenced and when they are sentenced, it won't be by the Government. It is going to be by the court. The court alone and the court will be told what these witnesses have done. They know that. That's what their deals require that the court be told all the crimes they have done (3921-22).

This particular speech gave rise to the inference that just because the Government had been a party to the deals with its various witnesses, this lent credibility to the witnesses' testimony. Merely because it is the Government who has the power to contract agreements with its witnesses does not mean that they should be entitled to any more credence than the defense witnesses.

On another occasion, the Assistant United States Attorney aimed his remarks directly at appellant's counsel:

> He wants you to try Mirabella; he wants you to try Autera, he wants you to try the agents, he wants you to try the prosecutor -- anybody but Tony Stassi, his client (3925-26).

These comments were totally unjustified. At no time during appellant's summation did he ever accuse the Goverment of any misconduct. In fact, his counsel specifically exempted the Government from any such allegation when he stated:

> Now, the same thing about the honor dormitory. Mr. Nesland admitted that there was a discrepancy between Perna and Verizino on the honor dormitory

> conversation. . . . This is a frame job -- f-r-a-m-e. I am not afraid to say that. I am not saying he participated in it; I am saying they did. He is a zealous prosecu r; he does his job. The problem is he ain't got nothing to work with that is any good. His case is made up of nothing but stool pigeon testimony (3808).

This Court must deter the Government from continually attempting to convince the jury that an attack upon its witness is an attack on the United States Government. Such ill-founded and prejudicial practice must be terminated.

Moreover, even if this Court should find that perhaps other counsel might have opened the door to such statements by the Government, the Government in this joint trial should still be foreclosed from making such blanket generalizations that hurt all the defendants on trial.

Immediately after the Government's summation, all counsel moved for a mistrial on the basis of the United States Attorney's improper comments. The court not only denied the motion but did not issue any curative instructions. Thus, the error went uncorrected, and appellant was precluded from receiving a fair trial. United States v. Drummond, 481 F.2d 62 (2d Cir., 1973).

POINT VI

PURSUANT TO FEDERAL RULES OF APPELLATE PROCEDURE, RULE 28(i), ALL RELEVANT ARGUMENTS RAISED IN THE BRIEFS FOR THE CO-DEFENDANTS ARE INCORPORATED BY REFERENCE.

CONCLUSION

FOR THE REASONS SET FORTH IN POINTS II AND III, THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED; ALTERNATIVELY, IN ACCORDANCE WITH THE REMAINING POINTS, APPELLANT STASSI'S CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

June, 1976

RESPECTFULLY SUBMITTED,

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HEIT

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 2 day of July 197 deponent served the within Brief upon:

U.S. Atty. So. Dist. of N.Y.

attorney(s) for
Appellee

in this action, at
1 St. Andrews Pl, NYC

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 2
day of July 197

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132845
Qualified in Richmond County
Commission Expires March 30, 1977